UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; and JAMES S. GORDON JR. Plaintiffs, v. SMARTBARGAINS.COM, LP, a Delaware Limited Partnership; Defendant.	No. CV 06-1129 JCC PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' CAN-SPAM CLAIMS

INTRODUCTION

1. Plaintiffs' First Amended Complaint ("FAC") contains a short and plain statement of Plaintiffs' claims against Defendant. In essence, between August 2003 and May 2006, Plaintiffs received 4506-plus e-mails from Defendant, each of which violated the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq. ("CAN-SPAM Act"), causing damage to Plaintiffs and entitling them to statutory damages.[1]

2. Defendant seeks dismissal of Plaintiffs' federal claims on two grounds: (a) that Plaintiffs have insufficiently pled their status as "Internet access services," and thereby lack standing; and (b) that the FAC does not exactly parrot the language of the

[1] The FAC also alleges violations of certain Washington state laws not at issue here, as the Motion to Dismiss is brought only as to the CAN-SPAM Act claims.

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statute to state that Plaintiffs, as Internet access services, were "adversely affected" by receiving 4506-plus e-mails from Defendant that violate the statute. (Instead the FAC states that the e-mails "caus[ed] damage" to Plaintiffs.)

3. Both arguments strain to misconstrue a short and plain statement of a claim that Defendant obviously understands. Defendant seeks to invent pleading requirements more technical than a "short and plain statement" and thereby evade the merits of the claim. Defendant additionally seeks to argue against the allegations in the FAC, which is prohibited in a Motion to Dismiss (see ¶¶5-6, below).

4. The Motion to Dismiss should be denied or, in the alternative, Plaintiffs should be granted leave to make the three-word amendment to the FAC that would make Defendant's objections unarguably moot.

MOTION TO DISMISS STANDARD

5. Other than jurisdictional facts and a request for relief, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief..." F.R.Cv.P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." F.R.Cv.P. 8(e)(1). "All pleadings shall be so construed as to do substantial justice." F.R.Cv.P. 8(f).

6. In construing these rules, Plaintiffs agree with Defendant that dismissal is warranted only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2] Review is limited to the FAC itself,[3] and all factual allegations set forth therein are taken as true and construed in the light most favorable to the Plaintiffs.[4]

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[2] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

[3] *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993).

[4] *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

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PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THEIR STATUS AS "INTERNET ACCESS SERVICES"

7. An Internet access service "enables users to access content,...electronic mail,...or other services offered over the Internet." 47 U.S.C. § 231, incorporated by reference in the CAN-SPAM Act at 15 U.S.C. § 7702(11). Plaintiffs' FAC states that each Plaintiff "provided and enabled computer access for multiple users to a computer server that provides access to the Internet." FAC ¶¶7,8. It further alleges that Defendant's actions "caused damage to Plaintiffs GORDON and OMNI as the providers of Internet access service..." FAC ¶18. Plaintiffs have made a short and plain statement notifying Defendant that they are making their claims as Internet access services. The FAC could not have been more clear without exactly quoting the statute. Plaintiffs' FAC is, if anything, prolix in needlessly specifying "access to a server to access the Internet" instead of the simpler "access content over the Internet."

8. Defendant argues that Plaintiff is not an "Internet access service" by asserting that "Plaintiffs' alleged status as an Internet access service is based merely on the fact that Jim Gordon has an account he shares with at least two other people to access the Internet." This assertion is untrue, and in any event should be ignored because no such allegation is made in the FAC. The Court "may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion."[5] Defendant does attempt to justify its assertion by noting that the FAC alleges that Plaintiff uses "a" server, as opposed to multiple servers, to provide Internet access services. Thus, Defendant construes paragraphs 7 and 8 of the FAC against Plaintiffs to urge that the allegations might conceivably encompass some types of shared Internet access among individuals that is not "Internet access service." However, construing in favor of Plaintiffs, as required here, paragraphs 7 and 8 of the FAC clearly also encompass services that are

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[5] *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

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unquestionably "Internet access services:" for example, setting up and hosting domain names, websites, and e-mail accounts for multiple users. Such activities may of course be accomplished with a single server as easily as with multiple servers – it is merely a matter of scale. The question of whether Plaintiffs' actual scale and scope of services qualify them as Internet access services may be resolved only by presentation of evidence and resolution by the trier of fact. Defendant's Motion to Dismiss should be denied.

PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THEIR ENTITLEMENT TO RELIEF

9. Plaintiffs' FAC states:

> On the basis of the facts set forth hereinabove, Defendant SMARTBARGAINS.COM, LP, initiated the transmission of the E-mails, and each of them, and the Additional E-mails, and each of them, to a protected computer in violation of 15 U.S.C. §7704(a), causing damage to Plaintiffs GORDON and OMNI as the providers of Internet access service receiving each such E-mail, in the amount of $100 for each such E-mail, as provided in 15 U.S.C. §7706(g)(3).

FAC, ¶18 (emphasis added). Plaintiffs thus give Defendant clear notice of their allegations that the Defendant's e-mails violate a specific federal law, caused damage to Plaintiffs, and entitle Plaintiffs to relief in an amount set in another specific federal law. Nothing in this statement is unclear.

10. Defendant, again, must clearly have understood Plaintiffs' FAC and its statutory references, because Defendant cites exactly the same statute – 15 U.S.C. § 7706(g) – to argue that Plaintiffs should have parrotted that statute's phrase "adversely affected" in their FAC. 15 U.S.C. § 7706(g)(1). Defendant clearly already has received notice that Plaintiffs' entitlement to relief is based on 15 U.S.C. § 7706(g), and nothing more is required by notice pleading standards. To require the exact statutory phrase to appear in the FAC would resort to "technical form" prohibited by F.R.Cv.P. 8(e)(1), and would not do Plaintiffs substantial justice, violating F.R.Cv.P. 8(f).

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11. In the alternative to simply denying the Motion to Dismiss, Plaintiffs request leave of Court to amend paragraph 18 of their FAC by simply adding three words:

> On the basis of the facts set forth hereinabove, Defendant SMARTBARGAINS.COM, LP, initiated the transmission of the E-mails, and each of them, and the Additional E-mails, and each of them, to a protected computer in violation of 15 U.S.C. §7704(a), adversely affecting and causing damage to Plaintiffs GORDON and OMNI as the providers of Internet access service receiving each such E-mail, in the amount of $100 for each such E-mail, as provided in 15 U.S.C. §7706(g)(3).

That Defendant's argument is specious should be highlighted by Plaintiffs' ability to amend the FAC in such a minuscule manner, without altering its force or meaning at all, and still thereby make the matter unarguably moot.

CONCLUSION

12. Defendant's Motion to Dismiss is based not so much on inadequacies in the FAC as it is on hairsplitting about which words should be used to convey substantially the same meaning. Defendant understands that Plaintiffs allege they are Internet access services, but argues that they are not – a controversion of fact that Defendant is free to put at issue by its Answer. Defendant also understands that Plaintiffs allege they were adversely affected by receipt of Defendant's 4506-plus e-mails, but argue that the FAC should be dismissed because it says "causing damage" instead of "adversely affecting."

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13. Defendant's Motion to Dismiss should be denied or, in the alternative, the Court should grant leave to Plaintiffs to amend the FAC by adding "adversely affecting and" to paragraph 18, which would make Defendant's objections unarguably moot.

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/s/ Eric C. Nelsen

DATE: February 12, 2007. By:______________________________

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2007, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Derek Alan Newman
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Robert M. Townsend
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and I hereby certify that on the date set forth above I also mailed by United States Postal Service, first-class postage prepaid, the foregoing document to the following non-CM/ECF participants:

None.

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/s/ Eric C. Nelsen

DATE: February 16, 2007. By:______________________________

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